United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

TO BE ARGUED BY:
Eugene Murphy

B

P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA ex rel ROBERT W. LLOYD :

Petitioner-Appellee :

-against- :

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility :

Respondent-Appellant :

- -x

DOCKET NO. 75-2021

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLEE

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APPELLEE WAS DEPRIVED OF HIS RIGHT TO A PUBLIC TRIAL

During most of the People's case against appellee, the courtroom was closed to spectators. No showing of need for such action was made. Appellee was thus deprived of his right to a public trial.

Early in his trial for sale and possession of a dangerous drug, the question arose whether appellee could demand "the public to be allowed to walk in and out when the undercover people testify." (A-51). That simply is the issue before this Court. There were no particular persons or classes whom appellee wished to have admitted. He requested only the right to have present the public or any person who might wish for any reason to watch his trial.

Appellee contends that in the absence of some showing of a countervailing necessity he had an absolute right to a public trial. Sixth Amendment, United States Constitution; Duncan v. Louisiana, 391 U.S. 145. Nevertheless he conceded in the District Court (A-18), and concedes here, that a number of exceptions exist which permit closing the courtroom.

> Thus the exclusion of the public in whole or in part has been found constitutionally acceptable where it was deemed necessary to protect the defendant, Sheppard v. Maxwell, 384 U.S. 333...Estes v. Texas, 381 U.S. 532... where there has been harassment of witnesses, United States ex rel Bruno v. Herold, 408 F.2d 125 (2d Cir., 1969) cert denied 397 U.S. 957... or to preserve order. United States ex rel Orlando v. Fay, 350 F.2d 967 (2nd Cir., 1965) cert.den. 384 U.S. 1008 ...United States v. Bell, 464 F.2d 667, 670 (2nd Cir., 1972).

The presence of minor victims or witnesses in sex cases may authorize a closed courtroom. Geise v. United States, 262 F.2d 151 (9th Cir., 1958) c.d. 361 U.S. 842; Melanson v. O'Brien, 191 F.2d 963 (1st Cir., 1951).

Finally, the disclosure of information of an extremely confidential nature might permit the banning of spectators and even of the defendant himself. Thus whenever the "sky-jacker profile" is to be examined such action is permitted. United States v. Bell, supra; United States v. Ruiz-Estrella 481 F.2d 723 (2nd Cir., 1973); United States v. Clark, 475 F.2d 240 (2nd Cir., 1973). Most recently this Court approved such action to preserve the confidentiality of trade secrets. Stamicarbon N.V. v. American Cyanamid Company, 506 F.2d 532 (2nd Cir., 1974).

Appellee does not quarrel with the contention that a courtroom may be closed but only with the statement that

> (n)o showing was necessary...that the agent's confidentiality would be jeopardized or that their lives would in fact be endangered (Appellant's brief, p. 6).

It is the routine and automatic closing of the courtrooms of Nassau County upon the untested statement of the District Attorney that such action is necessary that troubles appellee and apparently disturbed the District Court (A 43-A 45).

The care and caution enjoined before banning of the public dates back to United States v. Kobli, 172 F.2d 919, 923 (3rd Cir., 1949).

> (T)he Sixth Amendment precludes the general indiscriminate exclusion of the public from the trial of a criminal case in a federal court over the objection of the defendant and limits the trial judge to the exclusion of those persons or classes of persons only

whose particular exclusion is justified by lack of space or for reasons particularly applicable to them.

This Court in United States v. Clark, supra, and United States v. Ruiz-Estrella, supra, reversed convictions because, although a closing of the courtroom was authorized, the trial court banned spectators during too much of the proceeding. Both cases involved not the trial but the suppression hearing. In Ruiz-Estrella, the courtroom had been closed during the testimony of only one witness.

The publicity of the trial is thought to further several important objectives. It provides an "effective restraint on the possible abuse of judicial power." In re Oliver, 333 U.S. 257, 270; Stamicarbon N.V. v. American Cyanamid Company, supra at 540-541; United States ex rel Bennett v. Rundle, 419 F.2d 599, 606 (3rd Cir., 1969); People v. Jelke, 308 N.Y. 56, 62 (1954).

Additionally it may constitute "a security for testimonial trustworthiness."

> Its operation in tending to improve the quality of testimony is twofold. Subjectively, it produces in the witness' mind a disinclination to falsify; first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar; and next, by inducing the fear of exposure of subsequent falsities through dsiclosure by informed persons who may chance to be present or to hear of the testimony from others present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information. VI Wigmore §1834 (3rd Edition, 1940).

See also Stamicarbon, supra at 541; United States ex rel Bennett

v. Rundle, supra at 606; People v. Jelke, supra at 62-63; Note, "The Accused's Right to a Public Trial" 49 Colum L Rev. 110, 117 (1949).

Because of the importance of this right any departure from it "must be tested by a standard of strict and inescapable necessity." United States ex rel Bennett v. Rundle, supra, at 607.

> It is only under the most exceptional circumstances that limited portions of a criminal trial may be even partially closed. Stamicarbon N.V. supra at 542.

The District Court imposed the proper standard when it ruled that the trial judge "must have a clear convincing and compelling basis" for any such action (A-45).

Instead of satisfaction of this rigorous test we have only an "untested assertion of the prosecution." (A-43). Upon the district attorney's statement that the action was necessary to protect the confidentiality of the agents, the burden was shifted to appellee to prove that such drastic action was not required.

People v. Hinton, 31 N.Y.2d 71, the case relied upon to support the trial judges action is clearly distinguishable. The court closed the door and excluded spectators during the testimony of an undercover narcotic agent because

> (1)the undercover agent was still operating actively in the community; (2) that other narcotic investigations were pending; (3) that other targets in the narcotic investigations were present in the courtroom, thus jepordizing the agent's life if his identity were exposed. at 73.

However, holding that

> (n)ot only the defendant himself but also the public at large has a vital stake in the concept of a public trial. at 73.

the Court cautioned "that the discretion be sparingly exercised and then, only when unusual circumstances necessitate it." at 76.

Again our case presents a failure to satisfy the standard. The case demonstrated no "unusual circumstances". Indeed, the agents' investigation in Hempstead had terminated. (P. 345, Minutes of Trial). Not one of the three elements supporting the holding in Hinton was shown to be present.

The error committed was clearly of a constitutional dimension. This Court in United States v. Clark, supra, found the right to be so important that its violation during a suppression hearing required reversal. In United States v. Ruiz-Estrella, supra, exclusion of the public during the testimony of just one witness at a suppression hearing required reversal even though such action would have been proper during part of that witness' testimony.

Appellee's trial was closed to the public during almost all of the People's case, being open only during the testimony of the expert who testified that the substance involved was heroin. All of the People's real case against appellee was presented to an empty courtroom.

Moreover, appellee need show no prejudice to obtain relief. In most cases it would be impossible to show who had been excluded.

> To require proof of this by the defendant would be ironically to enforce against him the necessity to prove what the disregard of his constitutional right has made it impossible for him to learn.

United States ex rel Bennett v. Rundle, supra, at 608, Tanksley v. United States, 145 F.2d 58, 59 (9th Cir., 1944); Davis v. United States, 247 F.394, 398 (8th Cir., 1917).

The appellee was deprived of his right to a public trial. There was no reason shown for such action. The District Court properly granted the writ of habeas corpus.

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LEON J. VINCENT, Superintendent Green Haven Correctional Facility :

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Susan Briggs being duly sworn deposes and says that she is a clerk in the office of James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, N.Y., Criminal Division, attorney for the above ~~XXXXXXXXXXXXXXXX~~ Robert W. Lloyd herein. That she is over 21 years of age, and resides at Mineola, New York. That she served the within brief for petitioner-appellee on the 24th day of March 19 75 upon Louis J. Lefkowitz, Attorney General, 2 World Trade Center, New York, New York, Burton Herman, of counsel by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Susan Briggs

Sworn to before me this

24th day of March, 1975

Lorraine Hughes (Papas)

LORRAINE HUGHES
Notary Public, State of New York
No. 30-4701796
Qualified in Nassau County
Commission Expires March 30, 1975

CONCLUSION

FOR THE ABOVE STATED REASONS THE ORDER
OF THE DISTRICT COURT SHOULD BE AFFIRMED

Respectfully submitted,

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